IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

COUNCIL TREE COMMUNICATIONS, INC., BETHEL NATIVE CORPORATION, AND THE MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL Petitioners, v. FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA, Respondents.	)	Docket No. 06-2943

CONSOLIDATED REPLY TO OPPOSITIONS
TO EMERGENCY MOTION FOR STAY PENDING REVIEW

Council Tree Communications, Inc. ("Council Tree"), Bethel Native Corporation ("BNC"), and the Minority Media and Telecommunications Council ("MMTC") (collectively "Movants"), by their counsel and pursuant to 28 U.S.C. § 2112(a)(4), FRAP 18 and FRAP 27, hereby reply to the separate June 15, 2006 Oppositions to Movants' Emergency Motion for Stay Pending Review ("Emergency Motion"), one filed by Respondents Federal Communications Commission ("FCC" or "Commission") and United States of America, the other filed by Intervenors CTIA and T-Mobile USA, Inc. ("T-Mobile") (the "CTIA Opposition").[1] Respondents and Intervenors have opposed Movants' request that this Court stay as soon as possible the Commission's revised competitive bidding rules, adopted April 25, 2006 and modified June 2, 2006, as well as the conduct of Auction 66, an auction of Advanced Wireless Spectrum ("AWS"). Auction 66 is currently scheduled to commence in August 2006, with various key dates in advance of that auction either just passed or coming up in the very near

[1] Pursuant to a telephonic and email clarification provided to undersigned counsel by the office of the Clerk of this Court on June 16, 2006, this Reply is: consolidated; no more than 20 pages in length; and presented in 12 pt. typeface.

future.[2] For the reasons set forth below, the arguments advanced by the Respondents and Intervenors are without merit, and Movants' requested relief should be granted expeditiously.

Respondents and Intervenors describe this case in very similar terms. *Their* version is as follows. As one part of the build up to Auction 66, an auction of valuable wireless spectrum which has been in the planning stage for approximately five and one half years, the FCC initiated a rulemaking proceeding in February 2006 in response to a June 2005 request of Council Tree.[3] The *FNPRM* sought comment on Council Tree's proposal to disallow large, in-region wireless incumbents' investment in, or related involvement with, small businesses, rural telephone companies, and businesses owned by members of minority groups and women ("Designated Entities" or "DEs"), and thereby prevent those large carriers from benefiting from the "bidding credits" awarded to DEs at auction. According to Respondents and Intervenors, the Commission gave "ample" notice that a broad range of changes affecting existing DEs was possible. After what Respondents and Intervenors describe as extensive comment on a variety of issues was received, the FCC exercised its discretion in the *Second Report and Order*, FCC 06-52, (released April 25, 2006) 71 Fed. Reg. 26245 (May 4, 2006), and elected to adopt new restrictions of general applicability to all DEs, whether affiliated with a large wireless carrier or not: (i) a limitation on DEs' ability to lease or resell spectrum won at auction ("Lease/Resale Restriction"), and (ii) the substitution of a ten-year unjust enrichment schedule for the five-year schedule that has applied for many years (referred to herein as the "Five- and Ten-Year Hold Rules").[4] Under this version of the case, the FCC properly based the Ten-Year Hold Rule on a

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[2] For example, short-form applications on FCC Form 175 were due to be filed by yesterday, June 19, 2006. Upfront payments are due by July 17, 2006 at 6:00 p.m.

[3] *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, FCC 06-8 (released Feb. 3, 2006), 71 Fed. Reg. 6992 (Feb. 10, 2006) ("*FNPRM*").

[4] "Ten-Year Hold Rule," Movants' short-hand term of reference for this new unjust enrichment

suggestion made by Movant MMTC in its comments in response to the *FNPRM*. In Respondents' and Intervenors' view, the Emergency Motion reflects nothing more than Movants' disagreement with the way the FCC performed its statutory balancing act (i.e., promoting DEs while preventing unjust enrichment), and Movants' complaints are nothing more than the "sour grapes" of disgruntled auction hopefuls who did not get what they wanted. In addition, they say, the Emergency Motion raises no serious issues, is unsupported by record evidence, and does not even come close to satisfying any of the four prongs of the well-established test for granting judicial stays. As shown below, this rosy storyline does not survive scrutiny. The facts are very different and, under relevant law, compel grant of Movants' requested relief.

It must be emphasized that there is a sharp disparity in the characterization of this case by the Respondents before this Court and in the way the FCC Commissioners themselves have described this proceeding in their remarkable separate statements to the *Order on Reconsideration of the Second Report and Order*, FCC 07-78 (released June 2, 2006), 71 Fed. Reg. 34272 (June 14, 2006) ("*Reconsideration Order*").[5] According to FCC Chairman Kevin Martin, these DE-related changes were not "needed" at all. He only went along with them as part of an apparent political compromise.[6] Commissioner Michael Copps (joined by Commissioner Jonathan Adelstein) lamented the FCC's failure to allow sufficient lead time for adequate consideration of these changes. Commissioner Deborah Tate was sympathetic to the

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provision, is intended to convey the meaning that DEs must "hold" their control of licenses won at auction for 10 years or lose all or a portion of their bidding credits.

[5] Neither Respondents nor Intervenors even acknowledge the existence of any of the Commissioner's highly unusual, directly relevant, separate statements.

[6] "I agreed to the changes to *obtain the support needed* to establish the rules for wireless services that were essential to making the spectrum available for wireless broadband services this summer." Statement of Chairman Kevin J. Martin to *Reconsideration Order* (emphasis added).

plight of DEs who saw their auction participation plans disappear at the doorstep to the Auction. Commissioner Adelstein worried that the FCC's "course of action" below, despite its "legal maneuvering," might well fundamentally jeopardize the "troubled proceeding" that is Auction 66. In other words, the brave "face paint" that Respondents attempt to brush onto the FCC's eleventh-hour Auction 66 rule changes is eroded by the unvarnished criticisms leveled at those changes, and the process by which they were adopted, by the very Commissioners who made the decision to impose them.

Movants refute below each of the elements of Respondents' and Intervenors' version of this case.

1. The Fact That Auction 66 Is Important And Its Planning Began Years Ago Does Not Mean This Auction Cannot, And Should Not, Be Stayed By This Court.

Although Commissioner Copps expressed his concern that the changes to Auction 66's DE rules were rushed through at the last minute, without adequate time to "reach consensus," his bottom line in voting not to reconsider the Ten-Year Hold Rule and Lease/Resale Restriction was that Auction 66 is simply too important to slow down now. Respondents and Intervenors take a similar approach when they argue that Auction 66 has had a very long lead time, involving spectrum band clearing, early announcement of auction dates, and Congressional collaboration. Against such a history, the argument goes, no Court should step in and interfere on the auction's eve.[7]

Movants agree that Auction 66 is important. That is why they spent so much time, effort, and money in the year leading up to it developing a viable business plan. But Auction 66's

[7] The FCC suggests that Justice Stevens decision vacating an auction stay granted by the Sixth Circuit is controlling with respect to the appropriateness of a stay. *See* FCC Opposition at 16, *citing FCC v. Radiofone, Inc.*, 516 U.S. 1301 (1995). The case is inapposite. As Justice Stevens noted, the claim there related "to FCC regulations that prevent respondent from bidding for 3 of the 493 licenses available." 516 U.S. at 1301. The claim thus involved a single bidder precluded from bidding on less than 1% of the authorizations available, while this case involves harm to an entire class of bidders, who face preclusion from participation in Auction 66.

importance is precisely why this Court must not turn a blind eye to the FCC's failures to adhere to multiple statutory directives in adopting debilitating rule changes on the eve of the auction, without adequate notice to affected parties or supporting record evidence. Indeed, the FCC's own actions have brought Movants and this Court to the brink of a critically important auction that, in direct contravention of the statutory scheme (as set forth in the Emergency Motion), promises to be dominated by the large, wireless incumbents while serious, credible DEs like Council Tree and BNC can only watch as non-bidders from the sidelines.[8] Given Auction 66's importance, the lack of a credible explanation in the record below of why the FCC is pushing relentlessly on with the draconian, eleventh-hour Auction 66 rules firmly in place is at best mystifying. The seeds of the appropriate, rational solution can be found in FCC Chairman Martin's Statement to the *Reconsideration Order*. In light of the FCC Chairman's explicit recognition that the new rules are unnecessary, those rules can safely be eliminated for Auction 66, subjected to the proper notice that was never given, and tested through exposure to diverse public comment before any decision is made to apply them in future auctions.[9]

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[8] The record below allows no confusion as to why Movants find themselves unable to participate in Auction 66 at this late date. The combination of the Ten-Year Hold Rule and the Lease/Resale Restriction (including incorporation of the vague concept of "spectrum capacity") has made the maintenance of a "bidding credit" during the post-auction period so difficult and so uncertain that Movants' ability to attract financing on the basis of that bidding credit has precipitously collapsed, with no realistic prospect of recovery unless the offending rules are rescinded. Without a viable bidding credit program, the FCC finds itself in violation of multiple subsections of 42 U.S.C. § 309(j) -- (3)(B), 3(E), 4(A) & 4(D) -- that mandate FCC promotion of DE participation in spectrum auctions. The FCC's feeble attempt to argue that it does more than provide bidding credits -- it also creates licenses representing smaller blocks of spectrum that are thought to be more closely within reach of a new entrant -- is no answer. All bidders, large and small, are free to bid on smaller spectrum blocks. Congress clearly did not envision that the FCC would merely create second-class spectrum blocks for DEs. Rather, Congress envisioned competition for prime spectrum by DEs so robust that it would prevent an "excessive concentration of licenses" in the hands of large incumbents. *See* 47 U.S.C. § 309(j)(3)(B). The "bidding credit" is the only way the FCC currently tries to accomplish that goal. Other alternatives, such as tax certificates, installment payments, and spectrum set asides, have either never been tried, abandoned, or are not being utilized here.

[9] Auction 66 can clearly proceed without the new rules adopted in the *Second R&O*. Indeed, the

2. The FCC Did Not Give The Requisite Advance Notice In The *FNPRM* To Support Its Ultimate Actions In This Case, And The Result Was Arbitrary And Capricious.

Respondents and Intervenors both strain to persuade the Court that the *FNPRM* alerted potential commenters that the FCC might revisit its *existing* DE rules governing all DEs and change them. In fact, Respondents go so far as to claim repeatedly that the *FNPRM* gave "ample notice" on this issue. Respondents' Opposition at 10 n.25, 11, and 12. In Movants' view, there is simply no way to wring such a reading from the record below.

The *FNPRM*, repeatedly and in a carefully targeted manner, sought comment on two potential *new* rules -- one proposed by Council Tree to restrict the involvement of large, in-region incumbent wireless carriers with DEs, and the other an extension of that proposal suggested by the FCC to restrict involvement in DEs by "entities with significant interests in communications services." Subsidiary issues raised in the *FNPRM*, like "the portion of the license term" over which "unjust enrichment provisions" should apply, were all directly related to these two proposed *new* rules. Before this Court, Respondents have ripped the *FNPRM*'s "portion of the license term" inquiry out of context, even going so far as to elide certain critically important contextual language that was contained in paragraph 20 of the *FNPRM*. According to Respondents, the *FNPRM* "squarely asked parties to address 'over what portion of the license term should ... unjust enrichment provisions apply.'" Respondents' Opposition at 13 (quoting *FNPRM* ¶ 20) (citation omitted). Yet, there is germane language missing from this very careful quotation. Here is the entire *FNPRM* passage:

> "If we require reimbursement by licensees that, either through a change of 'material relationships' or assignment or transfer of control of the license, lose their eligibility for a bidding credit *pursuant to any eligibility restriction that we might adopt*, over what portion of the license term should such unjust enrichment

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FCC already has authority under the rules in place before the *Second R&O* to administer Auction 66 and prevent abuse. 47 C.F.R. §1.2110(j), (n). The FCC has "broad power to conduct audits at any time and for any reason, including at random, of applicants and licensees claiming designated entity benefits." *Second R&O*, at 149.

provisions apply?"

FNPRM at ¶ 20 (emphasis added). The entire quote makes clear that the *FNPRM* never proposed to change the unjust enrichment rules that applied to existing eligibility restrictions, of which there are many, and it never sought comment on a universally applicable change to the longstanding Five-Year Hold Rule. The FCC even echoed this point in the *Second R&O* when it synopsized the *FNPRM*, explaining that "*[p]ursuant to any eligibility restriction we might adopt*, we asked over what portion of the license term such unjust enrichment provisions should apply." *Second R&O* at ¶ 32 (emphasis added). Despite the carefully limited language of the *FNPRM*, the new unjust enrichment rules were dramatically made applicable "if a designated entity loses its eligibility for any reason . . . ." *Second R&O* at ¶ 37.[10]

Entirely missing from the record of the proceeding below is any articulation of a generalized concern with the five-year unjust enrichment schedule, nor is there any evaluation as to whether the new unjust enrichment rules would impair designated entities' access to capital.[11]

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[10] Respondents' self-serving use of an ellipsis is not confined to this instance. For example, at page 12 of their Opposition, in an effort to illustrate the broad nature of the comments sought by the *FNPRM*, Respondents advance a quote from the *FNPRM* that omits key contextual language. The full quote is as follows, with the limited language quoted by the FCC in brackets, and language *not* quoted in boldface:

> "**As noted above, we tentatively conclude that a relationship between a 'large, in-region incumbent wireless service provider' and an otherwise qualified designated entity applicant should trigger a restriction on the availability of designated entity benefits.** [We therefore seek comment on the specific nature of the relationship that should trigger] **such** [a restriction.]"

In context, this passage supports the narrowness of the *FNPRM*, not Respondents' claim of a broad inquiry.

[11] Council Tree's comments in response to the *FNPRM* are a case in point. In response to the question posed by the *FNRPM*, Council Tree urged retention of a five-year unjust enrichment period for any *new* eligibility restrictions adopted. Council Tree did not comment on what impact a doubling of the Five-Year Hold Rule for *all* DEs would have, because that critically important issue was emphatically not part of the *FNPRM*. The overall comment vacuum on this issue is the best evidence that the FCC gave no notice. Similarly, with respect to potential leasing or resale restrictions, the handful of comments received by the FCC were set in the context of the Council Tree proposal, which related solely to limiting DE leasing relationships

Before this Court, Intervenors argue that "[t]hose DEs that intend to enter and stay in the market as facilities-based providers of retail services are likely to find their ability to raise capital enhanced." Intervenors' Opposition at 8. Yet, none of this is on the record of the case below, and it is precisely the type of debate that should have *preceded* the consideration of any new unjust enrichment repayment period. Such fundamental deficiencies cannot be cured by pleadings submitted to this Court.

A Court must set aside the FCC's decision making in this context if it is "not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D). Under the Administrative Procedure Act, the Commission must provide notice of any proposed rules, including the terms or substance thereof or a description of the subjects and issues involved, *id.*, § 553(b)(3), and the opportunity for interested parties to participate in the rule making through the submission of written data, views, or arguments. *Id.*, § 553(c).

These "[n]otice requirements are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review."[12] None of that happened here.[13]

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with large incumbent wireless carriers. Intervenor CTIA, representing large incumbent carriers, certainly interpreted the *FNPRM* in that way and weighed in with strong opposition: "Extending 'material' relationships to including *leasing activities* abruptly reverses course, without the perquisite findings, of the conclusion in the secondary markets proceeding that such relationships should be permitted." CTIA February 24, 2006 Comments in response to the *FNPRM* at 4 (emphasis added).

[12] *International Union, United Mine Workers of America v. Mine Safety and Health Administration*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) (*citing Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983)).

[13] Respondents' reliance on the FCC's claimed ability to adopt a rule "substantially different" from the one proposed is unavailing here. "A 'substantially different' rule is permissible *as long as the participants had sufficient notice at the start of the process*." *Fertilizer Institute v. Browner*, 163 F.3d 774, 779 (3rd Cir. 1998) (emphasis added). The notice provided at "the start of the process" here was clearly insufficient.

The FCC cannot reasonably say that its new unjust enrichment rules were "tested via exposure to diverse public comment" or that it "ensure[d] fairness to affected parties."[14]

The result must also be set aside in substance. Lacking a record from affected parties, the Commission wholly failed to consider an important aspect of the problem (*i.e.*, resulting impairment of designated entities' access to capital).[15] Such a result is arbitrary and capricious, *see Motor Vehicles Manuf. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citations omitted) (emphasis added), and it must be set aside by the Court. *See* 5 U.S.C. § 706(2)(A).[16]

3. The FCC's Unilateral Pursuit Of Preventing Unjust Enrichment Has Thrown The Statutory Scheme Completely Out Of Balance

In an effort to secure deference from this Court under *Chevron*, Respondents contend that 47 U.S.C. §309(j) nowhere addresses the precise particulars of the Ten-Year Hold Rule or the Lease/Resale Restriction, leaving the agency considerable leeway to implement the statute's directive that the agency prevent any unjust enrichment that might result from the FCC's fulfillment of its primary statutory objective -- promoting the participation of DEs in spectrum

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[14] Respondents claim that the Lease/Resale Restriction is not arbitrary and capricious, that the FCC "had to draw the line somewhere." Respondent Opposition at 9 n.21. But this Court owes no deference to the FCC when it does not provide any rational underpinnings for its "line," (*Prometheus Radio Project, FCC*, 372 F.3d 373, 420-21 (3d Cir. 2004), *cert. denied*, 125 S. Ct. 2902 (2005)), when that line marks a radical departure from previous policies and rules, without notice, (*AT&T v. FCC*, 974 F.2d 1351 (D.C. Cir. 1992); *see also MCI Telecommunications Corp. v. FCC*, 842 F.2d 1296, 1303-04 (D.C. Cir. 1988)) and when that line has no relationship to the underlying regulatory problem. *Alltell Corp. v FCC*, 838 F.2d 551, 559 (D.C. Cir 1988).

[15] By reaffirming the rule changes without thorough consideration of the impact on designated entities' access to capital, the Commission repeated the error it made in the broadcast multiple ownership proceeding when it repealed the so-called Failing Station Solicitation Rule, the only television rule aimed at protecting minority ownership, without considering the impact on minority ownership. *See Prometheus Radio Project*, 372 F.3d, at 420-21.

[16] In the same vein, the *Second R&O* adopted another new unjust enrichment restriction that requires full reimbursement of the bidding credit (plus interest) if DE eligibility is lost before the "full build–out" of licenses. This additional change is undermined by the same flaws -- no notice and no comment. Respondents simply ignore this additional failure in their Opposition.

auctions.[17]

Conspicuously absent from the Respondents' Opposition, however, is any explanation at all of how the *Second R&O's* substantial revisions to the existing DE bidding credit rules -- imposition of the Ten-Year Hold Rule and the Lease/Resale Restriction -- can be squared with the statute's command that the FCC facilitate DE participation in auctions. Respondents barely acknowledge the existence of 47 U.S.C. §§ 309(j)(3)(B) & (4)(D). Rather, Respondents contend that the bidding credit rules, as revised, still leave room for a DE whose investors have a ten-year time horizon. The FCC, however, offers nothing beyond hopeful speculation to support this notion, and Respondents simply ignore the real world evidence that Council Tree and BNC presented concerning their immediate loss of investors after a year of planning. Likewise, Respondents do not bother to acknowledge the established investment time horizon utilized by the Telecommunications Development Fund, a creation of Congress whose Directors are appointed by Chairman Martin, and whose Directors include Chairman Martin. The longest investment horizon the TDF will even look at for investing tax dollars is six, not ten, years.[18]

The problem with Respondents' effort to skip past the first prong of *Chevron* is clear. The statute demands tangible FCC promotion of DE participation in auctions. The only way the FCC is currently fulfilling that mandate is through bidding credits, credits the FCC has now effectively nullified by imposing severe restrictions without any record evidence to inform its judgment.

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[17] The unjust enrichment provisions of 47 U.S.C. § 309(j)(3)(C) & (4)(E) are derivative, not primary -- they have no meaning on their own. That is, unless the FCC meaningfully facilitates DE participation in spectrum auctions, there can by definition be no enrichment, unjust or otherwise, to prevent.

[18] Respondents cite to, but offer no defense of, the *Reconsideration Order*'s irrelevant "reach" into an instructional television proceeding for "support" of the ten-year investment horizon, an analogy thoroughly debunked by Movants in the Emergency Motion. *See* Emergency Motion at 11 n.16.

Even under the second prong of *Chevron*, as this Court found in *Woodall v. Federal Bur. Of Prisons*, 432 F.3d 235, 249 (3rd Cir. 2005), regulations are impermissible if they do not "harmonize[ ] with the plain language of the statute, its origin and purpose."[19] An agency may not simply ignore statutory factors in adopting its implementing rules. Here, there is no way to reconcile the agency's action with its primary statutory obligation. Indeed, the changes in existing rules have "promoted" the exact opposite result of the one intended by Congress. By undermining DEs' financial sources, the FCC has strengthened the hands of the large incumbents, with a commensurate toll on both the size of auction bidding pool for Auction 66 (which logically means fewer dollars to the U.S. Treasury) and future competition in the wireless industry, none of which serves the public interest.[20]

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[19] *Woodall, quoting Zheng v. Gonzales*, 422 F3d 98, 119 (3d Cir. 2005). *See also GTE Service Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000) (FCC rules vacated because they "diverge[d] from any realistic meaning of the statute"), *citing Massachusetts v. Dept. of Transp.*, 93 F.3d 890, 893 (D.C. Cir. 1996)

[20] Respondents also claim that the Final Regulatory Flexibility Analysis ("FRFA") is in compliance with the Regulatory Flexibility Act ("RFA"), 5 U.S.C. §§ 601 *et seq*. Respondents Opposition at 14. But the FCC by definition did not meet all of the RFA requirements, when its final rules applied to an entire class of DEs (i.e., current licensees) that were not even mentioned in its Initial Regulatory Flexibility Analysis ("IRFA") or the *Second R&O*, and its final rules were radically different than as proposed. *See* Supplement at 4-7 (detailing the material changes made to FRFA). Exh. B12. The entire purpose of the RFA was circumvented. The FRFA bears little resemblance to the IRFA (as if an IRFA had never been completed), is materially incomplete, and therefore, fatally flawed. *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29 (D.C. Cir. 2005); *see also Southern Offshore Fishing Ass'n v. Daley*, 995 F. Supp 1411 (M.D. FL 1998).

Importantly, the FCC does not explain in the FRFA (or the *Second R&O*), as required by 5 U.S.C. § 604(5), why it rejected National Telecommunications Cooperative Association's ("NTCA") request that the FCC take steps to minimize the economic impact of the proposed rules on rural telcos and to "tailor its rules narrowly enough to target only real abuse." NTCA Feb. 24, 2006 Comments at 9. Instead, without notice, the FCC swept rural telcos, which are facilities-based service providers, into its broad restrictions on leasing and wholesaling, and the radical changes effected in the Ten-Year Hold Period. As the record indicates, rural telcos are not part of the problem or abuses the FCC is trying to prevent. This is not a harmless error, nor are the rules' application to current licensees mooted by the *Reconsideration Order*. There are still multiple unresolved issues with the FCC's imposition of the new rules on current licensees. *See, e.g.,* Cook Inlet Petition for Reconsideration at 2-3, Exh. D24.

4. There Is Adequate Record Support For Movants' Claims And Evidence Of The *Second R&O's* Impact Beyond Movants

Both Respondents and Intervenors fault Movants for not supporting their request for relief with record evidence. *See* Respondent's Opposition at 9; Intervenor's Opposition at 15. There are three answers to this argument.

First, the record does in fact contain evidence of the impact of the Ten-Year Hold Rule and Lease/Resale Restrictions on Movants. In Movants' May 25, 2006 Supplement to Motion for Expedited Stay, for example, Movants detailed how these new rules harmed them. In his declaration, Council Tree President Steve Hillard reviewed Council Tree's extensive, year long efforts to plan for participation in Auction 66 and itemized the irreparable harm that will be visited on Council Tree by the FCC's actions below, including the fact that the spectrum available in Auction 66 is unique, that there is no avenue for redress against the United States government, and that Council Tree may not survive its preclusion from Auction 66. *See* Motion for Stay Declaration. Likewise, BNC's President Anastasia Hoffman made clear that the last minute scuttling of its participation in Auction 66 jeopardizes its plan to develop and improve telecommunications services in the farthest reaches of Alaska, including remote, poor, underserved, rural Alaskan villages. *Id.*

Second, Movants cannot be faulted for any inadequacies in the record below. As noted above, among other things, the Administrative Procedures Act "[n]otice requirements are designed ... to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *United Mine Workers*, 407 F.3d at 1259. Here, however, Movants were blindsided two weeks before the start of Auction 66 with fundamental rule changes that the FCC had not proposed and which Movants had no reason to anticipate. *See* Section 1 above. Movants have been scrambling ever since, trying to recover the chance to participate in Auction 66 that vanished, literally overnight, with

release of the *Second R&O*. It is particularly inappropriate under such circumstances for the FCC to claim that there is no record evidence to rebut its own totally unsupported conclusion that its new Leasing/Resale Restriction will not negatively impact DEs that have bona fide business plans predicated on providing facilities-based wireless services. In fact, having maximum flexibility in reselling or wholesaling spectrum is a vital tool needed by start-up companies seeking to become viable competitors to the large incumbents. The FCC itself reached a similar conclusion in its *Secondary Markets Initiative*;[21] *see also* Further Supplement at 7, Exh. B14b. The FCC's about-face in the *Second R&O* is as startling as it is unsupported, and therefore is arbitrary and capricious.

Respondents' position also demonstrates disregard for the longstanding access to capital obstacles faced by DEs and the costs to DEs of providing retail services.[22] If the FCC had followed a proper rulemaking process, it would have learned that there are many legitimate ways to use leasing or wholesaling arrangements to help finance construction of a network (i.e., a facilities-based provider) and to provide service to the public. Furthermore, wholesaling spectrum is a particularly flexible and appealing business model in wireless markets today, utilized by facilities-based wireless providers in the normal course of business. In sum, the FCC either disregarded an important aspect of the problem or was ignorant of the consequences. Either reason justifies a stay and remand of the rules.[23]

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[21] *In re* Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 20,604, 20,626 (¶ 45) (2003), *affirmed*, *Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking*, 19 FCC Rcd 17503, 17542 (¶ 77) (2004) ("the secondary market policies we adopt will help achieve another of our goals, namely ensuring that many small businesses have significant new opportunities to provide spectrum-based services … and [will] enable [DEs] … to access additional capital through leasing arrangements that can be used to build out their networks.").

[22] *See, e.g.,* Royal Street Communications, LLC Letter at 4, Exh. D19.

[23] *Achernar Broadcasting Co. v. FCC*, 62 F.3d 1441 (D.C. Cir. 1995) (FCC did not consider all

Third, it is the *FCC's* position before this Court, not Movants', that suffers from a lack of record support. The hasty, improvident way in which the Ten-Year Hold Rule and Lease/Resale Restriction were adopted, without adequate notice, means that there is a virtual record vacuum on the critical issues before this Court. The FCC states vaguely that "the comments filed in response to the *Further Notice* convinced the Commission to modify some of the specific rules it originally proposed," but does not identify any particular comments that sparked the wholly different rule changes it ultimately adopted. In fact, there was no commenter that advocated the provisions the Commission ultimately adopted.[24] As noted above, for example, DEs did not comment on the import of a Ten-Year Hold Rule because no such change to the existing rules was identified for comment. The absence of comments from parties affected by the rule is sufficient to show inadequate notice under the APA. [25]

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relevant factors); *see also City of Brookings Municipal Telephone Co. v. FCC*, 822 F. 2d 1153 (D.C. Cir. 1987) (in light of anomalies in the data on which it relied, the FCC acted irrationally in glossing over gaping holes in the record.)

[24] To the extent Intervenors try to create a record in their Opposition with a handful of citations to the record, these efforts only emphasize the barrenness of the cupboard for this purpose. "Post hoc rationalizations advanced to remedy inadequacies in the agency's record or its explanation are bootless." *City of Brookings*, 822 F.2d at 1165 (*citing National Coalition Against the Misuse of Pesticides v. Thomas,* 809 F.2d 875, 882-83 (D.C. Cir. 1987)); *see also Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962). Intervenors tellingly observe only that "many commenters advocated a result different from the result Council Tree preferred," not that commenters recommended or supported the proposal that the Commission adopted. Intervenors' Opposition at 12 & n.34. In fact, each of the specific comments referred in the cited footnote (1) supported Council Tree's proposal (Comments of Madison Dearborn Partners, LLC, filed Feb. 24, 2006, at 1); (2) supported Council Tree's proposal with minor distinctions (Comments of Poplar Associates, LLC, filed Feb. 24, 2006, at 2 ("Poplar does not take issue with the core component of the Council Tree proposal ...")); (Comments of Dobson Communications Corp., filed Feb. 24, 2006, at 2-3 (advocating that new restrictions apply not just to large carriers, but to "large entities like Microsoft, Google, Comcast, Time Warner ...")); or (3) opposed any change in the rules (CTIA Comments at 17 ("The Commission should reject the tentative conclusion and move forward with the AWS auction using existing DE rules.")); T-Mobile Reply Comments at 8 (urging the Commission defer action "until it has the opportunity to gather a full record ...")); (Reply Comments of Cingular Wireless, filed March 3, 2006, at 10).

[25] *Wagner Electric Corp. v. Volpe,* 446 F.2d 1013, 1018 (3d Cir.1972).

The record that does exist below reflects the primary concerns of DEs and others who submitted comments *after* the *Second R&O* was released. *See* Exh. D. A review of these comments reveals that the adverse impact of the FCC's actions here extend to many others beyond Movants.

For example,

- The National Telecommunications Cooperative Association ("NTCA"), a trade association representing the interests of more than 556 rural telecommunications providers ("rural telcos"), states that "[t]he rules came without fair notice to the industry and with no opportunity for public comment. The lack of critical input from legitimate designated entities was a clear violation of the law . . . and will ultimately harm the entities the rules were intended to protect."[26]
- The Rural Telecommunications Group, Inc. ("RTG"), commented that the new rules "have the unintended effect of harming the small and rural businesses that they were theoretically meant to help. … The new material relationship rules are overbroad and unduly restrictive."[27] RTG also expressed concern that the "administrative cost of taking advantage of bidding credits, coupled with new, less flexible unjust enrichment rules, *effectively ends the FCC's DE program even for legitimate small businesses.*"[28]
- Cook Inlet, another DE, "already has suffered directly from the chilling effect of these new rules."[29]
- The Blooston Rural Carriers, a large number of rural telcos represented by a Washington law firm, confirms that the Ten-Year Hold Rule is "actually harmful to small business and rural telephone companies in its present form … [t]he benefits to be gained by the new rules are unclear at best, and unsupported in the record."[30] The new material relationship restrictions "work an undue hardship on rural telephone companies and small businesses, without adequate justification in the record...."[31]

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[26] NCTA Letter to Chairman Martin at 1. Exh. D16.

[27] RTG Letter to Chairman Martin at 1. Exh. D17.

[28] *Id.* at 2 (emphasis added).

[29] Cook Inlet Region, Inc. Petition for Reconsideration and Clarification at 4 (citing to the disintegration of deal negotiations to partition one of its Auction 36 licenses to another DE). Exh. D24.

[30] Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP Petition for Partial Reconsideration and/or Clarification at 3. Exh. D22.

[31] *Id.* at 5.

- The Eezinet Corporation, Opportunity Capital Partners and other DEs and investors wrote: "The possibility of these actions was never evident to us in the least during the course of the rulemaking, and we would have strongly opposed them if it had been.... In short, the actions taken by the Commission in the Second Order have the effect of gravely undermining DEs.... Critically, the Commission's recent postponement of the start of Auction 66 does not cure these grave problems."[32]

5. Movants Did Not Bring The *Second R&O* On Themselves

The Commission and Intervenors take special pains to argue, repetitively, that the changes wrought by the *Second R&O* had their genesis in an *ex parte* request for rule changes submitted by Movant Council Tree in June 2005, and that the Ten-Year Hold Rule was proposed by Movant MMTC. "Be careful what you ask for" is the not so subtle message conveyed by the government and its supporters before this Court. The argument should be rejected for several reasons.

First, as shown above, Council Tree's initial request for rule changes addressed the problem of large incumbent wireless companies' involvement with DEs and, until the *Second R&O*, such targeted changes were the only changes "on the table."[33] Council Tree never asked for a review of existing eligibility restrictions, the *FNPRM* never proposed to change the unjust enrichment rules that applied to existing eligibility restrictions, and the only comments Council Tree submitted in response to the *FNPRM* were squarely addressed to its narrowly-tailored proposal and the *FNPRM*.

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[32] The Eezinet Corporation, et al. Letter, at 2. Exhibit 1.

[33] Intervenors claim that the FCC's actions were necessary to address reported abuses. CTIA Opposition at 6. But the only harm reported in the record were the abuses of DE bidding credits by large incumbent wireless carriers. *See, e.g.,* Comments of Council Tree at 18, Exh. B3; *see also* NTCA Comments (explaining that rural telecommunications providers are not the source of the problem and that the FCC must tailor its rules narrowly enough to target only real abuse), *infra* n.20. However, the FCC's new rules swept all DEs into the restrictions without record support. The FCC cannot base its decision on abuses not shown to exist. *Alltell Corp. v. FCC*, 838 F. 2d 551, 559 (D.C. Cir. 1988) (the approach taken by FCC must bear some relationship to the underlying regulatory problem).

For its part, MMTC *endorsed* the Council Tree proposal, and suggested that the Commission "consider initiating an inquiry" regarding a broader rule change. In MMTC's view, such an inquiry is necessary -- the broader change requires the Commission to evaluate whether an actual problem exists under the current rule, as well as the impact of any new rule. Intervenors acknowledge that "MMTC proposed that this issue be put out for additional comments," but their claim that the FCC was *not* required to seek comment on MMTC's broader suggestion ignores FCC and legal precedent. CTIA Opposition at 9 n.24. The FCC may only change course and modify current rules pursuant to reasoned decision-making.[34] Reasoned decision making in the rulemaking context requires notice and comment. Here, the *FNPRM* only proposed to adopt new rules -- not change existing rules. Moreover, when the FCC adopted the Five-Year Hold Rule in 1997 under Part 1 for all services and auctions, it did so pursuant to extensive public comment.[35] Nothing less is appropriate here.

In any event, even if MMTC had asked for immediate imposition of the Ten-Year Hold Rule (which it did not), the FCC cannot base a new regulation on a single idea advanced in a single comment. The case law does not allow the agency to "bootstrap" a comment into the requisite notice,[36] and neither Respondents nor Intervenors cite to any supporting precedent. MMTC never proposed, or in any way suggested, an imminent change to a longstanding,

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[34] *Motor Vehicle Manuf. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (when changing courses, must supply a reasoned analysis for the change); *see also Prometheus Radio Project v. FCC*, 373 F.3d 372, 420-421 (3d Cir. 2003) (citations omitted), *cert. denied*, 125 S. Ct. 2902, 2903 and 2904 (2004).

[35] *Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures; Allocation of Spectrum Below 5 GHz Transferred from federal Government Use; 4660-4685 MHz*, Third Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 374, 408-409 ¶¶ 55-56 (1997).

[36] *AFL-CIO v. Donovan*, 757 F.2d 330, 340 (D.C. Cir. 1985) ("As a general rule, [an agency] must itself provide notice of a regulatory proposal. Having failed to do so, it cannot bootstrap notice from a comment").

existing rule. As the D.C. Circuit made clear in a recent case, these types of "ambiguous comments and weak signals from the agency gave petitioners no such opportunity to anticipate and criticize the rules or to offer alternatives. Under these circumstances, the ... rules exceed the limits of a 'logical outgrowth.'"[37]

6. Movants Have Satisfied All Four Parts Of The Judicial Stay Test

Movants have satisfied all four criteria used by this Court to evaluate stay requests, and a stay should issue.[38]

Movants have demonstrated a likelihood of success on the merits. The FCC's decision to place insurmountable hurdles in the path of DEs like Movants Council Tree and BNC on the very eve of Auction 66 without adequate notice and without supporting record evidence, greatly troubles even the FCC Commissioners who signed on to the decision. The FCC's lack of fidelity to the statutory scheme can be seen in the way the parties are aligned before this Court. The small businesses who enjoy favored status under 47 U.S.C. §309(j) have been locked out of Auction 66 by the FCC's ill-advised, unsupported last minute regulatory pirouette, while the large incumbent wireless companies, who pose the very danger of consolidation the statute is designed to guard against, strongly urge this Court to allow Auction 66 to proceed immediately, without the competitive bids of DEs like Council Tree and BNC.[39] One can hardly blame the

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[37] *United Mine Workers of America v. Mine Safety & Health Administration*, 407 F.3d 1250, 1261 (D.C. Cir. 2005), *quoting Shell Oil Co.*, 950 F.2d at 751.

[38] Intervenors suggest that a handful of prior stay denials related to FCC auctions support denial here (*see* Intervenors' Opposition at 1-2 n.2), but not one of the cases cited involved the type of conflict with fundamental statutory provisions that is at issue in this proceeding. *See, e.g., Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 968 & 972 (D.C. Cir. 1999) and Order, *SMR WON v. FCC*, 97-1536 (D.C. Cir. Sept. 29, 1997) (challenge by incumbent licensees to FCC's decision to auction new licenses in their licensed spectrum bands).

[39] Movants take special note of Intervenor T-Mobile's outlandish claim that it is not a large incumbent wireless provider (i.e., T-Mobile is the "smallest" of the incumbents). Intervenors' Opposition at 16-17 n.46. T-Mobile is a wholly-owned subsidiary of Deutsche Telekom, the second largest telecommunications company in the world in 2005. *See* Fortune Global 500:

incumbents for wanting to obtain this choice spectrum at the lowest possible prices.[40] Only the Communications Act, Administrative Procedure Act, and Regulatory Flexibility Act, as cited by Movants and applied by this Court, stand in their way.

The harm to Movants will be irreparable. Unless the requested stay is granted, they will not be able to participate in Auction 66 and the potential benefits, at the earliest possible time, of their participating in the bidding for, and their use of this prime wireless spectrum, will be lost. By contrast, any harm to the large incumbents and other bidders will be relatively small, as the Commission can ensure that any delay in rolling back the Ten-Year Hold Rule and Lease/Resale Restriction will be negligible. Intervenors clearly have the wherewithal to accommodate the additional delay needed to get this auction right.[41]

Finally, the overall public interest overwhelmingly favors a grant of the requested stay. The FCC is keenly aware of the tremendous costs associated with trying to "fix" an auction after the fact, under Court Order. In the relatively recent *NextWave* litigation, the FCC's mishandling of its then biggest-ever, $16.9 billion spectrum auction left the agency with the task of trying to

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Telecommunications (available at http://money.cnn.com/magazines/fortune/global500/2005/industries/Telecommunications/1.html (last viewed 6/19/2006)). T-Mobile's 2005 service revenues were reported as $12.308 billion, with its parent's revenues reported at nearly $74 billion. DEs, by contrast, come in two sizes -- annual revenues of $40 million or less and annual revenues of $15 million or less. Even at $40 million, the largest DE would be a fraction of one percent of the size of T-Mobile and a much lesser percentage of the size of Deutsche Telekom. "Chutzpah," indeed.

[40] Incumbents also cannot be blamed for wanting the auction to exclude potential facilities-based competitors. As Council Tree and BNC made clear to the FCC (*see* Motion for Stay), their plans for any Auction 66 spectrum they win call for construction of physical facilities that will bring manifold pro-competitive benefits to a highly concentrated industry and advanced wireless services such as broadband to rural and underserved areas. Without a substantial investment in physical facilities, there can be no meaningful competition with the large incumbents. *See Fresno Mobile Radio*, 165 F.3d at 968 (following denial of an auction stay, an intervenor that opposed the stay, Nextel, won 90% of the licenses offered -- 475 of 525 licenses).

[41] In 2003, the FCC established an initial AWS license term of 15 years, recognizing that the AWS clearing process is going to take years. FCC 03-251 at ¶ 70. A short delay in Auction 66 will not materially affect the overall roll out of AWS.

"unscramble the omelette" after winning bidders had deposited $3.3 billion with the FCC and built business plans around their licenses won.[42] *NextWave* stands as eloquent testimony to the need to "get it right" at the starting gate. The costs associated with the brief delay necessary to rectify the FCC's missteps here are dwarfed by those which will be incurred if the stay is denied, Auction 66 proceeds, and a Court later finds grounds to order the entire proceeding unwound.

CONCLUSION

For all the reasons set forth above and in Movants' Emergency Motion, Auction 66 should be stayed at the earliest possible time.

Respectfully submitted,

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June 20, 2006

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[42] *See e.g., In the Matter of Public Notice DA 00-49 Auction of C and F Block Broadband PCS Licenses, Order on Reconsideration*, 15 FCC Rcd. 17500 (2000), *rev'd sub nom NextWave Personal Communications Inc. v. F.C.C.*, 254 F.3d 130 (D.C. Cir. 2001), *aff'd*, 537 U.S. 293 (2003); *Requests for Refunds of Down Payments Made In Auction No. 35*, 17 FCC Rcd 6283 (2002).

EXHIBIT 1

June 19, 2006

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: WT Docket No. 05-211
AU Docket No. 06-30
Written Ex Parte Presentation

Dear Chairman Martin:

We are writing to you as designated entities (DEs) and those that have invested in DEs.

We are deeply troubled by many of the changes adopted in the *Second Report and Order and Second Further Notice of Proposed Rule Making* (FCC 06-52) released in WT Docket 05-211 on April 25, 2006 ("Second Order"). We support the Petition for Expedited Reconsideration filed in the referenced proceedings on May 5, 2006 by the Minority Media and Telecommunications Council, Council Tree Communications, Inc. and Bethel Native Corporation and the supplement thereto filed on May 17, 2006.

Among other things, the changes to the Commission's longstanding unjust enrichment schedule adopted in the Second Order greatly undermine, or even eliminate, DEs' ability to attract investment. For years, the Commission has employed a five-year unjust enrichment schedule, under which new entrants have a reasonable exit strategy if, for example, they fail to achieve their business plans. That is particularly important for investors and lenders who require reasonable flexibility in backing DEs who do not have the financial resources and record of performance of the larger industry incumbents.

Without any warning, the Second Order substituted a ten-year unjust enrichment schedule for the longstanding five-year schedule. It also instituted a new provision requiring full repayment of any bidding credit where the construction requirement applicable at the end of the license term has not been met. The possibility of these actions was never evident to us in the least during the course of the rulemaking, and we would have strongly opposed them if it had been. The flexibility to exit the business is central to the ability of DEs to secure financing. The Commission's sudden actions in the Second Order eliminate that flexibility. As a result, fewer DEs will undertake to participate in competitive bidding, and those that do will receive limited, if any, financial support from investors and lenders. This cannot have been what the Commission intended.

Similarly, without any warning, the Second Order placed substantial new restrictions on the ability of DEs to lease spectrum to others or to enter into wholesale and resale arrangements. In an entirely separate proceeding, the Commission has already placed limits on

the ability of DEs to take advantage of the secondary markets policies. Now, without notice or the opportunity to comment, the Commission greatly expanded those limitations, effectively removing spectrum leasing as a realistic option for DEs. Like all licensees, DEs require the opportunity to lease spectrum to others to fund network construction and operations. The new and unexpected limitations in the Second Report and Order unfairly limit that capability.

Finally, the new restrictions on the ability of DEs to enter wholesale and resale arrangements are gravely flawed. Traditional resale relationships are common in the wireless industry, and there is nothing in the record of this proceeding that suggests they should be limited as was done in the Second Order. Moreover, the use of the term "spectrum capacity" as part of the governing limitations, *see* Second Order, Appendix B (text of new Section 1.2110(b)(3)), is unfairly confusing as it relates to resale and wholesale relationships. It is not at all clear how the "spectrum capacity" of any individual license is to be measured in the case of these relationships, leaving DEs without any clear idea as to how to ascertain their compliance.

In short, the actions taken by the Commission in the Second Order have the effect of gravely undermining DEs and the DE program, which was likely not intended by the Commission. Critically, the Commission's recent postponement of the start of Auction 66 does not cure these grave problems. We urge the Commission to rescind the rule changes announced in the Second Order and to apply its current rules to licenses offered in Auction 66.

Respectfully submitted,

/s/ Bernard Gaiter
Bernard Gaiter
President/CEO
The Eezinet Corporation

/s/ Daniel S. (Toby) Osborn
Daniel S. (Toby) Osborn
Chief Financial Officer
Doyon Limited

/s/ Steven R. Bradley
Mr. Steven R. Bradley
Principal
Attucks Capital LLC and
Greenwood 361° LLC

/s/ J. Peter Thompson
J. Peter Thompson
General Partner
Opportunity Capital Partners

/s/ Brian Rich
Brian Rich
Managing Member
Catalyst Investors, LLC

cc: The Honorable Jonathan S. Adelstein
The Honorable Michael J. Copps
The Honorable Deborah Taylor Tate
The Honorable Robert M. McDowell
Fred Campbell
Bruce Gottlieb
Barry Ohlson
Aaron Goldberger
Angela Giancarlo

Federal Communications Commission

The FCC Acknowledges Receipt of Comments From ...

The Eezinet Corporation, Attucks Capital LLC, Greenwood 361° LLC et al.

...and Thank You for Your Comments

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CERTIFICATE OF SERVICE

No. 06-2943

Council Tree Communications, Inc. et al.
vs. FCC, et al.

(FCC Nos. 06-52, 06-71 & 06-78)

I certify that on this 20th day of June, 2006, I served copies of the Petitioners' Consolidated Reply to Oppositions to Emergency Motion for Stay Pending Review, and the Appearance as Counsel of Record for Dennis P. Corbett by causing them to be delivered by electronic mail and U.S. mail to the following (unless designated otherwise):

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